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CURRENT TOPICS.

The wholesome doctrine expressed by the maxim *vigilantibus, non dormientibus, jura subveniunt* has usually been invoked in cases, arising under the statute of limitations, and of sales, in connection with the principle, *caveat emptor*, (Broom's Leg. Max. 65, 772, 892); but it is no less applicable to the case of two persons equally innocent, one of whom must suffer a loss consequent upon the fraud of a third party. It was in effect, so applied by the Kansas Supreme Court in the case of Robbins v. Todman, the facts of which form a happy illustration of the principle. Todman held a mortgage of record upon real estate, executed by Cowdin to secure the payment of $2,500, with interest due thereon, evidenced by certain promissory notes; he commenced an action to foreclose the mortgage; then Cowdin made an arrangement with him by the terms of which Cowdin was to pay Todman $2,450 in settlement of the action and in satisfaction of the notes and mortgage; thereupon Cowdin made arrangement with one Robbins to lend him money to pay Todman, by the terms of which Cowdin was to secure a release of Todman's mortgage and give Robbins a first mortgage on the premises. Afterwards Todman, the record mortgagee, Robbins the maker of the new loan, and Cowdin, the record mortgagor, all met at the office of the register of deeds, where the mortgage was of record, with the understanding that the loan from Robbins to Cowdin was to be made, and Todman's mortgage released and satisfied, and, at the time of the meeting, all the parties had full knowledge of the arrangements between Cowdin and Todman, and between Cowdin and Robbins. While the parties were all together in the office of the register of deeds, Todman executed and acknowledged a release of the mortgage held by him, on the margin of the record, and immediately thereafter the note and new mortgage from Cowdin to Robbins were signed and acknowledged, and thereupon Robbins gave Cowdin the money mentioned in the note and mortgage just executed, and said note and mortgage were then delivered to Robbins with the knowledge and assent of all the parties, and in the presence of Todman, who made no objection; after which Robbins, the new mortgagee, handed the mortgage to the register of deeds, by whom it was recorded; Cowdin, the mortgagor, after receiving the money from Robbins, counted it and pronounced it "all right," and then holding the money in his hands toward Todman, the mortgagee in the released mortgage, said to him, "Now where are my papers?" Thereupon Todman handed the old notes and mortgage owned by him to Cowdin, who took them, then withdrew his hand, and, retaining both the money and the papers, suddenly left the room of the office, mounted his horse and galloped away. Ten days afterwards, Robbins applied to the court to be made co-defendant in Todman's suit against Cowdin, to foreclose the old mortgage, which was still pending; and the application being granted, filed his answer, setting up the mortgage by Cowdin to him, and further, the fact that the old mortgage of Cowdin to Todman had been duly released of record by Todman. Said Horton, C. J., reversing the judgment of the trial court in favor of the plaintiff: "The doctrine of equitable estoppel is applicable with great force against Todman; and although the conduct of Cowdin was criminal, for which he deserves to be severely punished, yet, Todman, rather than Robbins, must be the sufferer thereby. The confidence of Todman was betrayed by Cowdin, and Todman, not Robbins, is entitled to the recovery of the money which Cowdin held in his hands when he left so suddenly the room of the register's office and galloped away on his horse. As between Todman and Robbins, although each acted in good faith, there was not the like care and prudence. The former acknowledged satisfaction of his mortgage, and delivered his notes and mortgage to the mortgagor before he had received any money or other payment, evidently trusting to the mortgagor to carry out his agreement and promise to him. The latter trusted no one. Before he loaned his money or accepted the note and mortgage from Cowdin, he saw that the release of the Todman mortgage was properly executed on the margin of the book of records."

NOTICE TO QUIT.

The rule is that the necessity of a notice to quit is based on the relation of landlord and tenant, and where that relation does not exist, the notice to quit is not necessary.[1] Therefore, it has been held that a mortgagor in possession, is not entitled to notice to quit, as he is "at most a tenant at sufferance, and may be treated either as a tenant or trespasser, at the election of the mortgagee."[2] And no notice to quit is necessary where one has taken possession under an adverse claim.[3] So, where the tenant going into possession of the premises under the title of the landlord, afterwards disclaims, he has no right to insist on a notice to quit.[4] At common law, a tenant at sufferance was not entitled to notice to quit.[5] But it has been provided by statute in some of the States, that it shall be necessary to serve him with notice to quit. It is so provided in Missouri, where one month's notice is required,[6] and in Wisconsin.[7] But in Michigan,[8] and in Oregon,[9] the statute requires a notice of three months. This provision, requiring notice to be given to tenants at sufferance, has given rise to some troublesome questions. In considering this provision in a recent case in Michigan, that court said: "We shall not undertake to determine in this case, exactly what is meant by the statute above referred to, in giving to tenants at sufferance a right to the same notice to surrender possession as is given to tenants at will; but we do not think a tenant who wrongfully holds over for a short time, becomes immediately entitled to such notice, or that any short delay in commencing proceedings against him can confer the right. The statute evidently intends a case of a holding where the occupant has some equities which would render it unjust that he be required to surrender immediate possession; but he can not acquire such equities by a mere wrongful holding over, which is neither assented to nor acquiesced in."[10] It was conceded that he would, without doubt, have been entitled to notice as a tenant at will, if he had held over by the express or implied consent of his landlord.

In the previous case of Allen v. Carpenter,[11] the same court was called on to determine whether, under this statute, a mortgagor holding over after foreclosure of the mortgage, would be entitled to notice to quit under the provisions of this same statute. Under the circumstances of the case, the court was equally divided in opinion. Mr. Justice Campbell, in an opinion in which Mr. Chief Justice Martin concurred, maintained that it was not such a tenancy as required notice to terminate it; while Mr. Justice Cooley, Mr. Justice Christiancy concurring, maintained that notice was necessary, stress being laid on the fact that it was unjust ttha a tenant should be dispossessed as a wrong-doer without warning, when he was not guilty of intentional wrong, and perhaps not even aware that he was not holding in his own right. Mr. Justice Cooley declared "that whenever the occupant continues to hold by the consent of the owner, he becomes entitled to notice as tenant at will; and that where the owner suffers him to remain in possession without objection, and to make such use of the premises as would render it unjust to demand and enforce possession against him without warning; this laches of the owner entitles him to the statutory notice as tenant at sufferance. There is no wrong and no hardship in this to any one, and it seems to me to accomplish the purpose of the statute.

[1] Thackeray v. Cheeseman, 3 Harr. (18 N. J. L.) 1, 3; Haley v. Hickman's Heirs, Lit. Sel. Cases (Ky.), 266; Chamberlin v. Donahue. 45 Vt. 50, 55; Kilburn v. Ritchie, 2 Cal. 145; Den v. Webster, 18 Tenn. (10 Yer.) 512; Eberwine v. Cook, 74 Ind. 377; Indianapolis Manuf. Co. v. Cleveland, etc. R. Co., 45 Ind. 281; Meeker v. Doe, 7 Blackf. 169.

[2] Den v. Wade, 20 N. J. Law, 291, 294; Den v. Stockton, 12 N. J. Law, 322; Pierce v. Brown, 24 Vt. 165, 171; Allen v. Carpenter. 15 Mich. 25, 34.

[3] Williams v. Hensley, 1 Mar. (Ky.) 181.

[4] Bates v. Austin, 2 Mar. (Ky.) 217; Ross v. Garrison, 1 Dana (Ky.), 36; Tuttle v. Reynolds, 1 Vt. 80; Clapp v. Beardsley, Ib. 151; Chamberlin v. Donahue, 45 Vt. 50; Bolton v. Landers, 27 Cal. 104; Smith v. Shaw, 16 Cal. 88; Woodward v. Brown, 13 Pet. 1; Willison v. Watkins, 3 Pet. 43, 48; Stephens v. Brown, 56 Mo. 23; Kunzie v. Wixom, 30 Mich. 384; Fuller v. Sweet, 30 Mich. 237; Miller v. Shackleford, 4 Dana (Ky.), 278; Emerick v. Tavener, 9 Gratt. (Va.) 220; Harrison v. Middleton, 11 Gratt. (Va.) 527; Allen v. Paul, 24 Gratt. (Va.) 332; Harrison v. Marshall, 4 Bibb. (Ky.) 524; Den v. Blair, 15 N. J. Law, 181· McClane v. White, 5 Minn. 178; Chilton v. Niblett, 22 Tenn. 404; Lane v. Osment, 17 Tenn. (9 Yer.) 86, 90; Smith v. Shaw, 16 Cal. 18.

[5] Allen v. Carpenter, 15 Mich. 25, 42; Reed v. Reed, 48 Me. 388.

[6] Rev. Stat. (1879), vol. 1, p. 514, sec. 3078.

[7] Rev. Stat. (1878), p. 629, sec. 2183.

[8] Compiled Laws (1871), p. 3165 (4304).

[9] Gen Laws (1843-1872), p. 588, sec. 343.

[10] Benfey v. Congdon, 40 Mich. 283, 286.

[11] 15 Mich. 25.

The Supreme Court of New York was called on to give construction to a similar statute, in the case of Rowan v. Lytle,[12] decided in 1834. It was there held that a tenant for a year, holding over after the expiration of his term without the permission of his landlord, was not a tenant at sufferance within the meaning of the statute. In this case, Mr. Chief Justice Savage declared: "An estate at sufferance is an estate created, not by the consent, but by the laches of the owner. It seems to follow that without laches on the part of the owner or landlord, there can be no estate at sufferance. * * * * But for the purpose of giving this statute a fair construction and beneficial operation, no notice should be held necessary, unless the landlord has unnecessarily delayed his proceedings; and the object of the legislature will be best promoted by holding that such notice is not necessary, unless the landlord has permitted the tenancy at sufferance to continue for such a length of time as to imply assent. * * * * Under the circumstances of this case, a delay, to be justly called a laches, must be of longer continuance than three months (the time which elapsed between the end of the year and the commencement of these proceedings), and should, I apprehend, be accompanied with some evidence of negligence. In this case it appears the landlord endeavored to obtain possession without a resort to coercive proceedings, but was unsuccessful." Afterwards, in Livingston v. Tanner,[13] a tenant *per autre vie*, who had held over for nearly four months, without, so far as appeared, any knowledge that his estate had terminated, was entitled to notice under this statute, on the ground that it would be unjust, under the circumstances of the case, to dispossess him without warning.

The tenant is likewise not entitled to any notice to quit in those cases where his lease is for a fixed and certain period, at the expiration of which it is by its own terms to determine.[14] Under a statutory provision in Kentucky, the rule in that State is, that where a tenant holds for a year or more, under a lease to expire on a day certain, and the tenant holds over, he may be expelled without notice any time within ninety days. If, however, proceedings are not instituted within that time, none are allowed until the expiration of one year from the day the term or tenancy expired. And at the end of that time he is bound to quit without notice.[15]

Whether a tenant at will is entitled to notice to quit, is a question which has given rise to considerable discussion. There are several cases which maintain that a tenant at will is even better entitled to six months notice to quit.[16] These must be regarded, however, as tenancies at will from year to year, and not as the strict tenancy at will, as we understand it at the present time. In Ellis v. Paige, the Supreme Court of Massachusetts decided, but not by a unanimous opinion, that a strict tenant at will was not entitled to notice to quit.[17] But in a subsequent case in the same court, Parker, C. J., spoke of the necessity of notice in such cases as being still an open and unsettled question.[18] In this state of the matter, the legislature stepped in and put an end to the controversy by providing that a notice should be required. This case of Ellis v. Paige has, however, been generally regarded as laying down the correct rule in such cases.[19]

The question arises, whether a servant, who has had given to him, as an incident to his employment, the right to occupy a tenement upon the premises of his employer, is entitled to a notice to quit upon the dissolution of the relation of master and servant. Has a laborer a right to insist upon a notice to quit, who, by the terms of his agreement, has the possession of a house of his employer, for which

[12] 11 Wend. 617.

[13] 12 Barb. 481.

[14] Decker v. Adams, 12 N. J. Law, 99; Steffens v. Earl, 40 N. J. Law, 133; Allen v. Jaynish, 21 Wend. 628; Jackson v. Parkhurst, 5 Johns. 128; Logan v Herron, 8 S. & R. 460; Bedford v. M'Elherron, 2 S. & R. 49; Lesley v. Randolph, 4 Rawle, 126; Boggs v. Black, 1 Binn. 335; Young v. Smith, 28 Mo. 65; Alcorn v. Morgan, 77 Ind. 184; Harriet v. Lawrence, 2 Mar. 366. McClure v. McClure, 74 Ind. 108.

[15] Mendel v. Hall, 13 Bush, 233.

[16] Parker v. Constable, 3 Wils. 25; Jackson v. Bryan, 1 Johns. 322; Jackson v. Laughhead, 2 Johns. 755; Jackson v. Wheeler, 6 Johns. 271. And see Putnam, J., upon Ellis v. Page, 1 Pick. 43, reported 2 Pick. 71.

[17] 1 Pick. 43.

[18] Coffin v. Lunt, 2 Pick. 71.

[19] Davis v. Thompson, 13 Me. 209, 214; Moore v. Boyd, 24 Me. 243; Withers v. Larrabee, 48 Me. 578; Gordon v. Gilman, 48 Me. 473; Esty v. Baker, 50 Me. 325; Van Allen v. Rogers, 2 Caine's Cas. 314; S. C., 1 Johns. Cas. 33; Van Denberg v. Bradt, 2 Caines, 169; Van Cortlandt v. Parkhurst, 5 Johns. 128; Currier v. Perley, 24 N. H. 219, 228; Rich v. Bolton, 46 Vt. 67.

he pays no specified rent, but makes compensation therefor by receiving less wages than he would receive if he occupied a house of his own? "Many servants," says Chief Justice Mansfield, "have houses given them to live in, as porters at park gates. If a master turns away his servant, does it follow that he can not evict him until the end of the year?" He thought not.[20] So, in Kentucky, where a farmer employed a laborer for a year at a stipulated price, and agreed to furnish him a house at so much per month, the court held that upon ceasing to labor, his tenancy determined, being nothing more than a tenancy at will, and he was not entitled to any notice to quit.[21] So, in New Jersey, where a workman was employed by the month, and had the use of a house for himself and his family as part of his compensation, the court held that the relation between them was not that of landlord and tenant, but of master and servant, and that no notice to quit was necessary.[22] And in the same State, where one was employed as a lock tender, and as a part of his compensation was permitted to occupy one of the dwelling houses of the company adjoining the lock, the court held he was not entitled to the three months' notice to quit required by statute.[23] In a case in New York, Chief Justice Church, speaking for the Court of Appeals, said: "Where the occupation of a house by a servant is connected with the service, or is required by the employer for the necessary or better performance of the service, the occupation is as servant, not as tenant, and the possession is that of the master. * * * * The question depends on the nature of the holding, whether it is exclusive and independent of, and in no way connected with the service, or whether it is so connected or is necessary for its performance."[24]

An important and interesting case involving the question we are considering, was recently decided in the Supreme Court of Indiana. The question there was whether a Roman Catholic priest, who was subject to be removed at the pleasure of the bishop having charge over him, was entitled to a notice to quit the parsonage. We feel warranted in transcribing a portion of the opinion of the court as follows: "While it may not be said upon the facts of the complaint that the defendant was the hired servant of his bishop, it does appear that he was appointed to his position by, and held it at the discretion of, the bishop, and that his possession of the property was only an incident to his appointment, the better to enable him to discharge the duties of his office; and when in the exercise of that discretion, which by the rules and customs of the church he had the right to employ, the bishop removed the defendant from his charge or pastorate over the congregation, his right to possession of the property at once necessarily ceased. If, under the circumstances, the parties should be deemed to have come under a contract relative to each other, the plain meaning of the contract was, that when the defendant should cease to be pastor, which might be at the will of his bishop, he should cease forthwith to occupy the property, there being from the nature of the case no right of occupancy, except as an incident to the performance of the duties of pastor. And if this be regarded as a tenancy, it was a tenancy at will, and determined by one month's notice in writing delivered to the tenant, which notice the complaint shows to have been given. We are, however, of the opinion that the relation of the parties was more like that of master and servant, the possession of the priest being, in fact, the possession of his superior, the bishop, who had power at any time, and upon his own judgment or discretion, to remove one and install another in the office of pastor, and in the possession of the property of the office."[25] There seems to be no doubt upon the authorities that where the relation of master and servant exists between the parties, and the servant occupies a house as an incident to his employment, he is not entitled to notice to quit.[26] As between vendor and vendee, where the vendee has been let into possession of the premises under a contract of purchase, which he has failed to comply with, the rule must be regarded as settled that such vendee is not

[20] King v. Storck, 2 Taunt. 339.
[21] McGee v. Gibson, 1 B. Mon. 105.
[22] McQuade v. Emmons, 38 N. J. Law, 398.
[23] Morris Canal Co. v. Mitchell, 31 N. J. Law, 100.
[24] Kerrains v. People, 60 N. Y. 221.
[25] Chatard v. O'Donovan, 21 Am. Law Reg. 461.
[26] Haywood v. Miller, 3 Hill (N. Y.), 90; People v. Annis, 45 Barb. 304; Doyle v. Gibbs, 6 Lans. 180; Comstock v. Dodge, 43 How. Pr. 97.

entitled to notice to quit.[27] Where a stranger to the owner, on his behalf and in his name, makes a lease of his property and the lessee has entered into possession under it, such lessee is not entitled to any notice to quit from the owner of the premises.[28] And where no rent had been paid for twenty years before action brought, it was held that the jury had a right to presume that the relation of landlord and tenant had ceased, and that no notice to quit was necessary.[29] Where the tenant held over for two years, but without recognition from his landlord, he was held not to be entitled to notice to quit.[30] In a case in Kentucky it was held that if a suit for the possession of land was dismissed for the want of notice, in a subsequent action for the same premises the former suit will be regarded as dispensing with the necessity of notice to terminate the tenancy, which was a tenancy from year to year.[31] And it has been held that no notice was necessary to the under tenants.[32] In a case in California it was held that where a notice to quit was served on the original lessee, the notice bound an under tenant, who acquired possession from the tenant after its service.[33] While in a case in New York the court held that a notice to quit given by the lessor to his immediate lessee who had continued to pay the rent was sufficient, although another was in possession of the premises.[34] Where a parol agreement provided for the renting of premises for one month, and for each successive month thereafter until the landlord should want the premises for his own use, when the tenancy was to expire, it was held that this could not be considered as a tenancy at will or by sufferance. "It was an agreement," said the court, "for an indefinite number of months, subject to be terminated by a notice from the landlord that he wanted the premises. Under such an agreement the statutory notice of thirty days to a tenant at will or at sufferance, was not necessary."[35] Where a landlord sent to his tenant already in possession of the premises, written permission to remain two years longer free of rent, and tenant continued in possession without informing the landlord that he declined the terms offered, it was held that he would be deemed to have accepted them, and that upon the expiration of the term he could be dispossessed without notice to quit.[36] "The writing," the court said, "could be construed as a notice to quit after the expiration of the two years."

The rule requiring notice to quit to be served on the tenant, being for the benefit of the tenant, he is of course at liberty in his written lease to waive his right by an express agreement to that effect.[37] And when a landlord has once served notice to quit, his subsequent conduct may amount to a waiver of it. In Lucas v. Brooks,[38] the Supreme Court of the United States considered the question of the waiver of a notice to quit. In a proceeding in forcible detainer, the notice to quit, which was the foundation of the suit, was served in March, 1867, and required the premises to be surrendered in April, 1868. But there was evidence that a distress warrant was afterwards issued upon the affidavit of one representing himself to be the agent of the landlord, for rent sworn to be due for rent for the year ending April 1, 1871, which had been levied on the property of the defendant, who had given a forthcoming bond, the matter being still pending, This, it was contended, constitutes a waiver of the notice to quit, and entitled the defendant to a verdict. On this question Mr. Justice Strong remarked: "It is true the notice to quit might have been waived, and doubtless should have been regarded as waived by the distress warrant if it had been issued by the plaintiff, or by his authority. But waiver is always in part a question of intent, and there could have been no intent to waive if the act claimed to have been a waiver was either unknown to the plaintiff, or unauthorized by him, or not ratified by him." The court below had charged that if notice to quit was

[27] Den v. Webster, 18 Tenn. 512; Chilton v. Niblett, 22 Tenn. 404; Glascock v. Robards, 14 Mo. 350; Den v. Westbrook, 15 N. J. Law, 371; Van Valkenbergh v. Rahway Bank, 23 N. J. Law, 583; Ross v. Van Aulen, 42 N. J. Law, 49.

[28] Yellow Jacket Silver Mining Co. v. Stevenson, 5 Nev. 233.

[29] Crowther v. Lloyd, 31 N. J. Law, 395.

[30] Den v. Snowhill, 23 N. J. Law, 448.

[31] Corneillson v. Corneillson, 1 Bush. 153.

[32] Roe v. Wiggs, 5 B. & P. 330.

[33] Schilling v. Holmes, 23 Cal. 227.

[34] Livingston v. Baker, 10 Johns. 270.

[35] People v. Schackno, 48 Barb. 551; People v. Goelet, 64 Ib. 476; s. c., 14 Abb. Pr. (N. S.) 130; Woodrow v. Michael, 13 Mich. 187.

[36] Hulett v. Nugent, 71 Mo. 132.

[37] Hutchinson v. Potter, 11 Pa. St. 472.

[38] 18 Wall., 436, 455.

given, and afterwards a distress warrant was sued out to recover the rent, the presumption of law would be that it was sued out with the assent of the plaintiff, in which event he could not maintain the action unless the evidence satisfied the jury that the agent exceeded his authority. And it is held that the receipt of subsequently accruing rent is a waiver of the notice to quit.[39] As to the length of time before the expiration of the tenancy, that it was necessary to give the notice to quit, it is, of course, well understood that in tenancies from year to year the rule required a six months' notice to be given.[40] But in the case of tenancies for periods running less than a year, a different rule governed. By analogy the rule requiring a six months notice in tenancies from year to year, would only make necessary a half month's or a half week's notice in the case of monthly or weekly tenancies. But this analogy was not observed. Monthly and weekly tenancies were so brief that it was probably considered unwise to require merely a half month's notice or a half week's. Hence, in the case of tenancies running for periods of less than a year, the notice was regulated by the letting, and was equivalent to a period. Where the letting was for a quarter, it was necessary to give a quarter's notice,[41] and in the case of monthly lettings, a monthly notice,[42] while in the case of weekly tenancies a week's notice was considered essential.[43] But by an agreement of the parties the length of time required for the notice could be varied, and might be limited to end on a particular day or time.[44] However, if it was not otherwise agreed on, it was necessary that the notice to quit should terminate with the current period of the year, or month, or week of the tenancy, as the case might be.[45] In New Hampshire, under their statute regulating notices to quit, the courts hold that the notice to quit may be made to quit at any day therein named, instead of the precise term of a year or period.[46] The length of the notice to be given is now regulated by statute in most of the States, and instead of the six months' notice necessary at common law, only a three months' notice is now generally required.[47] In some of the States it has been provided that a tenancy at will or at sufferance shall be terminated by giving notice in writing to quit at a day named in the notice.[48] And in Illinois a tenancy from year to year may be terminated upon sixty days' notice.[49] While in Louisiana, it is provided that fifteen days' notice shall be sufficient if no time is fixed in the lease for its determination.[50]

It is to be observed that a notice to quit, in order to be valid, should truly state the day on which the tenancy is to terminate. "If, therefore," says Mr. Chief Justice Shaw in a case in Massachusetts, "a person designate in his notice a day for the termination of his tenancy, which is not the day on which the rent is payable, or a day on which the tenancy can be legally made to expire by a notice, the notice is unavailing and the tenancy may still continue. No one is obliged to regard a notice which fixes a day for the termination of a lease different from that on which a lease can be by law made to terminate; such a notice being one that neither party had a right to give, is treated as a nullity. * * * * It is by no means necessary to name the pre-

39 Prindle v. Anderson, 19 Wend. 391; s. c., 23 Wend. 616.

40 Right v. Darby, 1 Term, 159, 162, 163; Johnston v. Huddleston, 4 B. & C. 922; Parker v. Constable, 3 Wils. 25; Gullivar v. Burr, 1 W. Bl. 596; Jackson v. Hughes, 1 Blackf. (Ind.) 421, 427; Hanchett v. Whitney, 2 Ark. 241; s. c., 1 Vt. 311; Barlow v. Wainwright, 22 Vt. 88; Hall v. Wadsworth, 28 Vt. 410; Silsby v. Allen, 43 Vt. 172; Hall v. Myers, 43 Md. 449; Ross v. Garrison, 11 Dana, 36; Morehead v. Watkyns, 5 B. Mon. 229; Currier v. Perley, 4 Foster (N. H.), 219, 224.

41 Kemp v. Derrett, 3 Camp. 510.

42 Parry v. Hazell, 1 Esp. 94; Roe v. Raffan, 6 Esp. Cas.; Doe v. Scott, 6 Bing. 364; Currier v. Perley, 4 Foster (N. H.), 219, 224.

43 Peacock v. Raffum, 6 Esp. 4; Campbell v. Scott, 6 Bing. 362.

44 Tyler v. Seed, Skin. R. 649; Doe v. Bell, 5 D. & E. 471; Doe v. Charnock, Peak Cas. 4; Currier v. Perley, 4 Foster (N. H.), 219, 226.

45 Right v. Darby, 1 D. & E. 156; Doe v. Bell, 5 D. & E., 471; Roe v. Ward, 1 H. Bl. 97; Doe v. Dunnovan, 1 Taunt. 555; Usher v. Moss, 50 Miss. 208; Anderson v. Critcher, 11 G. & J. 450; Prescott v. Elm, 7 Cush. 346.

46 Hazeltine v. Colburn, 11 Foster (31 N. H.), 466, 471; Currier v. Perley, 4 Fost. (24 N. H.), 219.

47 Virginia Code (1873), p. 969; sec. 5; West Virginia Code (1868), p. 526; Colorado Gen. Laws (1877), p. 474, sec. 1246; Missouri Rev. Stats. (1879), vol. I., p. 514, sec. 3077; Minnesota Statutes (1877), ch. 75, p. 820, sec. 40, Indiana Rev. Stats. (1881), sec. 5209; Kansas Gen. Stats. (1868), p. 540, sec. 5; Pennsylvania Brightly's Purdon's Digest (1700-1872), vol. II., p. 880; New Hampshire Gen. Laws (1878), p. 575, sec. 2; Rhode Island Pub. Stats. (1882), p. 648, sec. 2; New Jersey Revision (1709-1877), p. 575, sec. 29.

48 New Hampshire Gen. Laws (1878), p. 575, sec. 1; Rhode Island Pub. Stat. (1882), p. 648, sec. 1.

49 Rev. Stat. (1874), p. 658, sec. 5.

50 Revised Code (1870), art. 2686.

cise day and date on which a tenancy is to expire, in a notice to quit, but it may be designated in general terms, if stated correctly." [51]

HENRY WADE ROGERS.

[51] Sanford v. Harvey, 11Cush. 93.

MISREPRESENTATION AS AFFECTED BY INTENT.

A misrepresentation, as defined by Bouvier, is: "The statement made by a party to a contract that a thing relating to it is in fact in a particular way, when he knows it is not so." From this definition, it must be inferred that a knowledge of the falsity of the statements at the time of making the contract, must exist in order to allow the person wronged by such statements to recover for the damages sustained; and so have some of the courts held.[1] But the question of intent has received such different constructions by different courts, that it may not be amiss to give it a little consideration. Sewall, J., in Emerson v. Brigham,[2] lays down the rule in the following words: "The rule has always been, I believe, that an action of deceit, or an action on the case for deceit, in a bargain or trade, is maintainable only where the deception complained of has been intentional on the part of the seller." The court in this case, quoted Justice Popham, who states the law thus: "If I have an article which is defective, whether victuals or any thing else, and I, knowing it to be defective, sell it as sound, and so represent or affirm it, an action upon the case lies for the deceit; but, although it be defective, if that is unknown to me, although I represent or affirm it to be sound, no action lies, unless I warrant it to be sound."[3] In Boyd's Executors v. Brown,[4] which was an action on the case for deceit, arising from false representations as to the credit of a third person, the court said: "The question always was, did the defendant knowingly falsify or wilfully suppress the truth with a view of giving a third party a credit to which he was not entitled?" "If he make representations productive of loss to another, knowing such representations to be false, he is responsible as for a fraudulent deceit." The conflict that had existed between the Queen's Bench and the Exchequer was brought to a close by the decisions of the Exchequer Chamber in Evans v. Collins, in 1844, and in Ormrod v. Huth,[5] in 1845. In the latter case, Tindal, C. J., said: "The rule which is to be derived from all the cases appears to us to be, that where, upon the sale of goods, the purchaser is satisfied without requiring a warranty, he can not recover upon a mere representation of the quality by the seller, unless he can show that the representation is bottomed in fraud; but if the representations were honestly made, and believed at the time to be true, there is no fraud, but *caveat emptor* applies, and the representations furnish no ground of action. In Evans v. Collins,[6] it was held that the general rule of law is, that fraud must concur with the false statement in order to give a ground of action. And this, after a series of decisions on both sides of this question, from Chandelor v. Lopus,[7] down to the present time, seems to be the established doctrine in England.[8] On the other hand, there is as much conflict on the law relating to this point in this country as in England. While many of the States follow the law as established in England, others take the opposite view, and hold that an action for damages may be sustained for misrepresentation, even when made innocently. Cooley, C. J., in Converse v. Blumrich,[9] in speaking of the statements made by one of the parties, said: "We will not undertake to say that he did not convince himself, by some process of reasoning, that they were correct. But the legal aspect of the case would not be different, if we came

[1] Emerson v. Brigham, 10 Mass. 202; Chandelor v. Lopus, 2 Croke. 4; Bond v. Clark, 35 Vt. 577; Barber v. Morgan, 51 Barb. 116; Bartholemew v. Benley, 15 Ohio, 660.

[2] 10 Mass. 202.

[3] Dyer, 75, in margin.

[4] 6 Barr, 310. See, also, Haly v. Tree, 3 T. R. 51; Foster v. Charles, 6 Bing. 369; Corbit v. Brown, 8 Bing. 33; Allen v. Addington, 7 Wend. 9; Arres v. Melward, 8 Taunt. 637; Hanar v. Alexander, 5 B. & P. 241; Vernon v. Keys, 12 East, 631.

[5] 14 M. & W. 651.

[6] 3 Q. B. 820.

[7] 2 Croke, 4.

[8] Benjamin on Sales, 425; Childers v. Wooler, 2 E. & E. 287; Childers v. Wooler, 29 L. J. Q. B. 129; Wilde v. Gibson, 1 H. L. Cases, 633.

[9] 14 Mich. 108, citing Ainsley v. Medleycott, 9 Ves. 21; Taylor v. Ashton, 11 M. & W. 401; Smith v. Richards, 13 Pet. 26; Lockridge v. Foster, 4 Scam. 569; Smith v. Babcock, 2 Wood & M. 246; Tuthill v. Babcock, 2 Wood & M. 298.

to that conclusion, since the courts must look at the effect of untrue statements upon the person to whom they are made, rather than to the corrupt motives of the one making them. If one obtain the property of another by means of untrue statements, though ignorant of their falsity, he must be held responsible as for a legal fraud." In Allen v. Hart,[10] it was held that it was not indispensable to the right to rescind, that the party making the misrepresentations knew them to be false, or that he was ignorant of the fact stated, so long as the matter was material and the other party had a right to rely upon them and was deceived.[10] In Missouri, the court held that the representations of the vendor to the vendee rendered him liable for damages, although he was honestly mistaken in regard to the facts stated.[11] However, in this case, one of the grounds of decision was that the party selling land was presumed to know its boundaries, and if he made statements not knowing them to be true, it was just as criminal as to have stated what was known to be false. Kinsey, C. J., in Snyder v. Findley,[12] said: "It is perfectly immaterial, so far as regards the question of law, whether the defendant knew, or did not know, the falsity of the facts which he represented; so far as the morality of the action is concerned, there is unquestionably a vast difference, but there is none in law." And this seems to be the doctrine which has become pretty well established in this country.[13]

This would naturally seem to be the most equitable rule, fer surely if any one is to suffer for the innocent misrepresentations of a vendor, justice would declare that all the burden should not fall on him who had nothing to do with the mistake. To give the wrongdoer all the advantage and fruits of his own misrepresentations, is to pay a premium on fraud when it can be perpetrated without discovery, or to place such a risk upon the vendee as to be a serious restraint to commercial transactions. It is a well settled rule in law that the contracting party has a right to rely upon the statements of the vendor.[14] And, if this be so, it surely ought to follow as a natural consequence that the vendor should be liable for any statements that may have been made by him as inducement to a contract, and may have wrought an injury upon the vendee.

Perhaps some of the apparent conflicts on this question can be reconciled on the doctrine of implied warranty, the presumed knowledge of the vendor or the exclusive jurisdiction of equity over mistakes, but it would be exceedingly difficult to find any principle that would reconcile some of the extreme cases on the one hand[15] with those that take an opposite view on the other.[16]

The question sometimes arises as to the effect of false representations innocently made by an agent, when the facts stated were known to be false by the principal. In Cornfoot v. Fowke,[17] it was held that the false representations by the agent, if made in the belief that they were true, would not support a plea of fraud in an action on the contract, although the facts stated were known to the principal to be false. But in commenting on this case, Lord Campbell, C. J., said: "I am not called on to say whether that case was well decided by the majority of the Exchequer or not, although the voice of Westminster Hall was, I believe, rather in favor of the dissentient chief baron.[18] And the same decision has been seriously questioned at other times, and may be safely said to be overruled.[19]

The principal is liable for the fraudulent representations of his agent, although he did

10 72 Ill. 104.
11 Buford v. Coldwell, 3 Mo. 477.
12 Coxe, 48, 51.
13 Lockridge v. Foster, 4 Scam. 570, 573; Parham v. Randolph, 4 Howard's Miss. 435; Rosevelt v. Fulton, 2 Cow. 139; Miner v. Medbury, 6 Wis. 295; Lewis v. McLemore. 10 Yerg. 206; McKenon v. Taylor, 3 Cranch. 270; Glasscock v. Minor, 11 Mo. 655; Converse v. Blumrich, 14 Mich. 108; Fisher v. Mellen, 103 Mass. 503; Collins v. Dennison, 12 Met. 549; Elliott v. Boaz, 9 Ala. 772; McCormick v. Malin, 5 Blackf. 509.
14 Mead v. Bunn, 32 N. Y. 275; McLellan v. Scott, 24 Wis. 81; Hale v. Philbrick, 42 Iowa, 81; Bigelow on Fraud, 67; Matlock v. Todd, 19 Ind. 130; Starkweather v. Benjamin, 32 Mich. 305.
15 Taylor v. Leith, 26 Ohio St. 428; Bird v. Forceman, 62 Ill. 212; Brooks v. Hamilton, 15 Minn. 26; Weed v. Case, 54 Barb. 534; Faribault v. Sater, 13 Minn. 223; Stone v. Denny, 4 Metc. 151.
16 Converse v. Blumrich, 14 Mich. 108; Lewis v. McLemore, 10 Yerg. 206; McKennon v. Taylor, 3 Cranch, 270; Miner v. Medbury, 6 Wis. 295; Smith v. Richards, 13 Pet. 26; Bennet v. Judson, 21 N. Y. 238.
17 6 M. & W. 358.
18 Wheelton v. Hardisty, 8 E. & B. 270.
19 National Exchange Co. of Glasgow v. Drew, 2 Macqueen H. L. Cases, 103; Barwick v. The English Joint Stock Bank, 2 Exch. 259; Wheelton v. Hardisty, 26 L. J. Q. B. 265; Fuller v. Wilson, 3 A & E. (N. S.) 58.

not know of, or authorize, his fraudulent conduct [20] And so in Bennett v. Judson,[21] it was held to be proper to set forth in the declaration the fraud of the principal, although he was in no wise connected with the fraud, and did not know that the statements made by his agent were false. If the representations of the agent turn out to be false, though innocently made, and the principal be also innocent of any fraud, then the latter's liability will depend upon the conflicting decisions already referred to. In England, the doctrine laid down in Chandelor v. Lopus will apply.

Sometimes the person making representations is presumed to know whether what he states as true, is true or not, and in such cases he can not be heard to say that he made the representations innocently if they turn out to be false.[22] As where a lessor through forgetfullness represented himself as capable of leasing certain premises, when, in fact, he had already leased them.[23] Or where one of the partners of a banking company represented that a balance sheet had been correctly prepared, and on the strength of his statement another person bought a share in the bank, he was held to be liable for the loss resulting from his misrepresentations.[24] If an executor innocently misrepresent the condition of a legacy to be safe and substantial, and state that it will be paid, and on the strength of the statement a marriage settlement be made, the executor will be liable for the whole amount.[25] In Ayre's Case,[26] in which a plan of fraudulent representation was set up based on the report given to the public by the directors of a life insurance company, the Master of Rolls said: "Whether the directors personally knew that these statements were delusive and untrue is, in my opinion, wholly immaterial; they are bound to know their falsity; they must be held to have known it; they were the vouchers to the public of the accuracy of their statements."

[20] Udell v. Atherton, 7 H. & N. 172; s. c., 7 Jur. (N. S.) 777; 30 L. J. Exch. 337.

[21] 21 N. Y. 238. See also Locke v. Stearns, 1 Met. 560; White v. Sawyer, 13 Gray, 586.

[22] Kerr on Mistake and Fraud, 69; Evans v. Fowler, 21 Beav. 217; Ainslie v. Medlycott, 9 Ves. 21.

[23] Slim v. Croucher, 1 D. F. & J. 518.

[24] Rawlins v. Wickham, 3 De G. & J. 204.

[25] Hutton v. Rossiter, 7 D. M. & G. 9.

[26] 25 Beav. 527. See also Pulsford v. Richards, 17 Beav. 87.

A man is presumed to know whether statements made in regard to his own trade or business are true or not, and if he, though innocent, misrepresent facts, to the injury of another person, he is as liable as if he had knowingly made the misrepresentations.[27]

Detroit, Mich. I. N. PAYNE.

[27] Kost v. Bender, 25 Mich. 515; Pickard v. McCormick, 11 Mich. 68; McGar v. Williams, 26 Ala. 467; Eaton v. Winnie, 20 Mich. 156.

RAILROAD — CONSOLIDATED COMPANIES —CLAIMS SOUNDING IN TORT—UNLIQUIDATED DEMANDS.

WHIPPLE v. UNION PACIFIC R. CO.

Supreme Court of Kansas, September, 1882.

In August, 1879, the Kansas Pacific R. Co. owned and operated a line of railway through the city of Lawrence, and while so owning and operating its railroad one of its trains ran over and injured the plaintiff. In January, 1880, the Kansas Pacific R. Co., the Denver Pacific Railroad and Telegraph Co., and the Union Pacific R. Co., entered into an agreement of consolidation, by which agreement they formed, or attempted to form, the Union Pacific R. Co., and to such company, by the articles of consolidation, transferred all their respective properties. The articles of consolidation expressly stipulated that the consolidated company should not be liable for the individual debts of the constituent companies, but that such constituent companies should continue in existence for the purpose of adjusting all claims and demands, and also that the consolidation should not prevent the enforcement of any valid obligation or liability of either constituent company against the properties so transferred by such constituent company. *Held*, that before the plaintiff could maintain an action against the consolidated company, whether such consolidation articles were valid and such consolidated company a legal corporation, or the articles of consolidation void, and the consolidated company a mere irregular association, he must, by an action against the Kansas Pacific R. Co., the party who did the injuries, convert his unliquidated claim into a liquidated demand, and have both the fact and the amount of the Kansas Pacific company's liability adjudicated.

Error from Douglas County.

Thomas J. Fenlon and *Byron Sherry*, for plaintiff in error; *J. P. Usher*, for defendant in error.

BREWER, J., delivered the opinion of the court:

On June 15, 1880, the plaintiff in error, plaintiff below, commenced his action against the defendant, to recover for personal injuries, The name of the defendant, as stated in the title to the petition, is Union Pacific Ry. Co,, Kansas Division, formerly Kansas Pacific Ry. Co. In the body of the petition it is alleged: "That said Union Pacific Ry. Co., Kansas Division, formerly Kansas Pacific Ry. Co., defendant, is a railway

company duly organized under the laws of the State of Kansas, and as such corporation was, on the second day of August, 1879, etc." The petition further alleged that the injuries were done on the second day of August, 1879. Defendant answered by a general denial, and afterwards, by leave of the court, filed an amendment to its answer, which, duly verified, denied that it was a corporation organized under the laws of the State of Kansas, as alleged in the petition. Upon the trial, after plaintiff had offered testimony tending to establish the allegations of his petition and had rested, the defendant showed that at the time of the injury the Kansas Pacific Ry. Co., a corporation organized under the laws of the State of Kansas, was the owner of and operating the road; that subsequently thereto, and on the 24th day of January, 1880, the Kansas Pacific Ry. Co. was consolidated with the Union Pacific R. Co. and the Denver Pacific Railroad and Telegraph Co., and by such consolidation became merged in the Union Pacific Ry. Co., and that the consolidated company, the Union Pacific Ry. Co., was since operating the road, and that all the agents and employees along the line of the road were the agents and employees of the consolidated company. A copy of the articles of consolidation was offered in evidence. Upon this testimony the district court instructed the jury to return a verdict for the defendant. Thereupon the plaintiff made a motion for a new trial, and in connection therewith asked leave to amend his petition so as to allege that at the time of the injury the Kansas Pacific Ry. Co owned and operated the road, and that on the 24th day of January, 1880, this corporation was consolidated with the Union Pacific R. Co. and the Denver Pacific Railroad and Telegraph Co., and by said consolidation forming and composing the present defendant; that by said consolidation the present defendant became possessed of all the properties and charged with all the liabilities of the Kansas Pacific Ry. Co., and that in pursuance thereof the present defendant had taken possession of the road and other properties of the Kansas Pacific Ry. Co., and the latter company had wholly ceased to operate the road, or to have any agents within the State of Kansas, and that the present defendant had ever since been operating this road as a part of its line. This motion for leave to amend and for a new trial was overruled, and now the plaintiff brings the case here for review.

Plaintiff contends that the consolidation is, so far as the Kansas Pacific Ry. Co. was concerned, absolutely null and void; and, secondly, that if it be valid he has no right to maintain this action directly against the defendant under the terms of the consolidation. On the other hand, defendant contends that the consolidation is valid, and that under its terms no action can be maintained against the defendant on account of this injury. And, further, that the question of the validity of the consolidation is not properly presented in this case, and can not properly be determined under the issue, as formed by the parties. Very full and elaborate arguments have been made on both sides upon all these questions, and we have also been favored with briefs prepared by the attorney general of the State and other leading counsel in cases involving the validity of this consolidation pending in the United States circuit courts. Of course, the first inquiry necessary is, what issues were presented by the pleadings, for it would be not only unnecessary but improper for us to enter into a discussion and determination of questions whose decision would in no way affect the judgment in this case. And here we remark that the validity of the consolidation is not in issue in this case. The reasons for this will be obvious as we proceed. And, first, it is evident that under the pleadings and testimony there are but two corporations, either in fact or in name, one the Kansas Pacific Ry. Co. and the other the Union Pacific Ry. Co. There is no corporation, no organization, either in law or in fact, bearing the name of the "Union Pacific Ry., Kansas Division;" none known or passing under such name. There was and is unquestionably a corporation named the Kansas Pacific Ry. Co. There is at least a pretended corporation known and styled the Union Pacific Ry. Co. Whether the consolidation be valid or not, whether the consolidated company has a legal existence or not, there was an attempted organization of such consolidated corporation, whose name is alone "The Union Pacific Ry. Co." Of course, if the consolidation be valid such consolidated corporation legally exists, and bears only its chosen and legal name. On the other hand, if the consolidation be void and the consolidated corporation without legal existence, the proceedings are not tantamount to a mere change of the name of the Kansas Pacific Ry. Co. That corporation has simply pretermitted the discharge of its corporate functions and duties in favor of an irregular association. It has not attempted to assume a new name, to change its old or permit itself to be known by such new name. Possibly a corporation like an individual may permit itself to pass under and be known by other than its legal name, and under such assumed name may sue and be sued; but there is no pretense of anything of this kind here. Neither the Kansas Pacific Ry. Co. nor its officers, nor stockholders, nor any parties interested in the organization of the Union Pacific Ry. Co. have assumed or represented, or in any manner held out the idea that the Kansas Pacific Ry. Co. was existing under any other than its legal name. The parties have attempted a consolidation of that corporation with two others. They have pretended nothing else, and if the attempted consolidation fails, it fails in toto and does not work, that which was not intended, a change in the legal name of either of the constituent companies. It is well to bear this very clearly in mind, so as not to be misled by the mere name given to the defendant in the petition. The words Union Pacific, formerly Kansas Pacific Ry. Co., imply identity

of corporation with mere change of name. The testimony discloses no pretense of a change of name, but simply the attempt to organize a new corporation, and whether that attempted organization stands or falls the names of the constituent companies remain unchanged.

Secondly, it appears impliedly from the petition as originally framed and clearly from the amendment tendered that the party sued was the consolidated corporation; but that consolidation whether it be a legal corporation or an irregular association did not do the injuries complained of. They were unquestionably done by the Kansas Pacific Ry. Co.

Now this consolidation can be held for the liabilities of either constituent company only by and to the extent of express stipulations. If A, B & C, individuals, enter into partnership, form an association or organize a corporation, such partnership, association or corporation is in no manner, except by express contract, liable for the individual debts of either A, B or C. So the Union Pacific Ry. Co., whether a legal corporation or an irregular association, a corporation *de jure* or *de facto*, is not liable for the debts of either constituent company, unless it has in terms contracted to become so. Article 8, of the consolidation agreement, provides for the transfer to the consolidated company of all the properties of the constituent companies,and closes with the words: "This assignment, transfer,sale and conveyance is to the said consolidated corporation, subject to all liens,mortgages and duties pertaining thereto."

Article 10 reads as follows: "The new company hereby formed does not herein assume any separate or individual liability for the outstanding debts, obligations and liabilities of the respective constituent companies,whose several and separate existence as to third parties shall, as respects such debts, obligations and liabilities of every kind and nature, still continue, notwithstanding these articles of union and consolidation; but nothing herein contained shall prevert any valid debt, obligation or liability of either constituent company from being enforced against the property of the proper constituent company, which, by force of these articles, becomes the property of the consolidated company. The corporate existence of the respective constituent companies shall not absolutely cease, *eo instanti*, on the consummation of the union and consolidation herein provided for, but shall remain and continue, so far as necessary, to carry out the intent and purpose thereof."

This is all there is in the consolidation agreement which bears upon the question of the liability of the consolidated company for any of the obligations of the constituent companies. Clearly that is not enough to sustain this action of the plaintiff, which is simply on an unliquidated demand against the Kansas Pacific Ry. Co. The consolidated corporation has no power to adjust such a claim and bind the Kansas Pacific Ry. Co. by such adjustment, neither can it be compelled to bear the cost and expense of an action for its adjustment. The Kansas Pacific has a right to be heard before any unliquidated demand against it is adjusted and paid out of the properties that it has turned over to the consolidated company. It has never made such consolidated company its agent for the purpose of adjustment.

Again a judgment recovered in this action becomes a general lien on all the properties of the consolidated company, and this irrespective of the amount of properties received from the Kansas Pacific Company. It is true the amount claimed is but $20,000, and we may presume the value of the properties turned over by the Kansas Pacific to be largely in excess of this amount, but the principle would be the same if the amount claimed was $2,000,000. The judgment, if non-collectible in Kansas by virtue of existing liens upon the property of the consolidated company here, could be transferred to any other State or Territory, and would become a conclusive adjudication upon all the properties of said consolidated company whencesoever obtained. The silence of the consolidation agreement would authorize no such action. The express repudiation of liability in article 10 only emphasizes the impossibility of maintaining an action like this. So that whether we look upon the defendant as an irregular association or a legal corporation, whether we consider the articles of consolidation and the express stipulations therein as valid, or ignore them entirely, defendant has no authority to adjust this unliquidated demand against the Kansas Pacific, no power to bind it by any admissions in an action, can not be chargeable with the expense of a litigation for the purpose of adjusting such a demand, and is not liable to a general judgment against it, giving a lien upon all its properties.

Thirdly, the Kansas Pacific is the original, the primary debtor, and therefore *prima facie* the one to be sued for the alleged injuries. If the consolidation agreement be invalid, then, of course, the Kansas Pacific remains a corporation intact and in full vigor and alone liable for this demand. If the consolidation agreement be valid, then, by its terms, the existence of the Kansas Pacific is preserved for the purpose of the settlement of all claims against it, and it, and it alone, is the defendant which must primarily be sued. Whatever proceedings may be proper after judgment for the purpose of enforcing such judgment, the first step is a judgment against the Kansas Pacific. It may be, then, that a common law execution will be sufficient, or it may be that the powers of a court of equity will be requisite for the purpose of adjusting liens and equities. But we are met here by the objection of counsel for plaintiff, that, according to the testimony, there is no way of bringing the Kansas corporation into the courts of this State. It is, of course, a citizen of this State, being a corporation created by its laws, and yet it has turned all its properties over to a new organization, and is without officer or agent within the limits of the State upon whom to serve process.

To that we reply first, we can not presume the impossibility of bringing the Kansas Pacific into court by ordinary process. If summons is placed in the hands of a sheriff, he may find the president of the corporation, or some duly authorized agent, upon whom to serve process. We pass by the promise of the learned counsel for defendant that he himself would enter an appearance for the Kansas Pacific whenever suit was brought against it, with the just remark of the counsel for plaintiff, that it is not a matter of grace or favor, but a matter of right, that a corporation created by the State should be subject to the reach of the process of its courts. It is true, the learned counsel for defendant may be the party designated by the Kansas Pacific to receive service of process; certainly his appearance in a court would be *prima facie* evidence of his right to enter the appearance of any client, and if there were any reason to doubt his authority, the statute, sec. 7, chap. 2, Comp. Laws 1879, provides for proof of it. But, secondly, beyond that, suppose all the officers of the Kansas Pacific are outside the State, that it has made no provision for service within the State, and that there is no individual within the State upon whom service can be made, so as legally to bind the corporation; and suppose, still further, that the corporation, pretermitting the discharge of its duties and functions as given to it by the State, has ceased all operations within its borders; and yet, if there be properties accumulated by the corporation under its charter, and in pursuance of the powers given to it by the State, which properties have not been actually appropriated to the discharge of its debts, we think the plaintiff is not without remedy. Within the spirit of the attachment and publication laws, the plaintiff may cause process to issue to seize such properties and bring the defendant corporation into court by publication as an absconding or concealing debtor. And beyond all this, there remains the visitorial power of the State to inquire into the proceedings of any corporation it has created, and to pursue and seize any property it has accumulated for the purpose of applying it to the satisfaction and discharge of its liabilities. In all this we think ample remedy lies with the plaintiff. Hence, in conclusion, we hold that the first step to be pursued by the plaintiff in respect to his claim for damages, is an action against the Kansas Pacific Ry. Co., the corporation which did the wrongs alleged, and an adjustment and adjudication in such action of plaintiff's claim for damages. After such claim has been thus adjudicated and converted into a liquidated debt, then we think the plaintiff may pursue the properties of said Kansas Pacific Ry. Co., into whosesoever hands it has passed. It follows from these considerations that the ruling of the district court was correct and its judgment must be affirmed.

All the justices concurring.

CONTRACT—ILLEGALITY—GRAIN FUTURES.

EVERINGHAM v. MEIGHAN.

Supreme Court of Wisconsin, September 9, 1882.

1. No compromise by the parties of differences in respect to clearly illegal contracts and transactions can purge them and produce a valid claim.

2. So *held* where the contract was one for the purchase and sale of grain by the plaintiff for the defendant in form for future delivery, but where in fact no grain was intended to be, or ever was, received or delivered, and where a difference having arisen between the parties as to who should bear the losses incurred in such speculation, and paid by the plaintiff, it was agreed that a part of such losses so paid should be borne by the latter, and that the balance thereof be re-paid to him by the defendant.

Appeal from Circuit Court, Milwaukee Co.

Jenkins, Elliott & Winkler, for respondent; *Markham & Noyes*, for appellant.

ORTON, J., delivered the opinion of the court:

The defendant, engaged in the grain and produce trade at Cresco, in the State of Iowa, in 1876, shipped and consigned to the plaintiff, a commission merchant in the city of Milwaukee, grain and produce to be disposed of by him for the defendant, and drafts were drawn upon the plaintiff and paid by him from time to time on account of such shipments, and such business continued between the parties until July 1, 1878, at which time there was a balance of $151.80, on account of such shipments and sales, in favor of the plaintiff. A short time after the commencement of this business the defendant employed the plaintiff to buy and sell grain for him, in form, for future delivery at the chamber of commerce in the city of Milwaukee, and to account to him for the profits thereof. This business was called by various names in the correspondence of the parties, as "scalping," "deals." "options," "speculating deals," etc., while the former was called the "regular" business, and they were kept separate on the books and accounts. On the first day of July, 1878, the defendant was indebted to the plaintiff on this "scalping" account in the sum of $2,109.64, for losses in the business. A short time before there had been a disagreement between the parties as to which should bear these losses, the defendant insisting that the plaintiff should bear the whole or part of them, and the plaintiff insisting that the defendant should bear the whole; and it was finally arranged—whether by compromise, settlement, accounting or concession need not now be determined—that the scalping account should stand at $848.20, by deducting from the whole account $1,261.44, which sum, with the addition of $151.80, the balance of the regular account, made $1,000 to be thereafter paid. The parties continued their regular business of the shipment and sale of produce until 1879, with an occasional scalping transaction, and there was then a balance of $799.92, without interest, on

both accounts, against the defendant, for which this suit is brought.

The plaintiff charges an accounting and a compromise of differences on July 1, 1878, by which this $1,000 was agreed to be paid. The defendant, in his answer, charges that said scalping business was a gambling transaction between him and the plaintiff, by which the plaintiff was to buy and sell grain for him without receiving or delivering any such grain, and without any intention of either party that any grain should be received or delivered, but with the intention only to pay or receive the differences between the prices named in the contract and the market rate, whichever way the same might be, and that pursuant to such contracts no grain was actually received or delivered, but such differences were so settled or adjusted, whereby the plaintiff claimed he had lost the said sum of $2,109.64 up to July 1, 1878, and that the plaintiff deducted therefrom $1,261.44, and that the balance of $848.20 was to continue to be kept as an account separate from the account of the regular grain shipments. And the defendant further charged that all such pretended losses upon such gambling transactions were incurred by the plaintiff by his failure and refusal to comply with his instructions in regard to the time and manner of purchasing and selling the grain under said gambling contracts. The testimony of the defendant clearly and positively supports his answer, and especially the allegations thereof relating to the transactions of the parties in the purchase and sale of grain in the City of Milwaukee, and at the chamber of commerce, and makes the contracts of the plaintiff, for such purchase and sale of grain, gambling contracts, and the employment of the plaintiff by the defendant, for that purpose, a gambling transaction, within the definition and authority of the case of Barnard v. Backhaus, 52 Wis. 593; s. c., 9 N. W. Rep. 595, [11 Cent. L. J. 56] and the testimony of the plaintiff rather corroborates than denies the testimony of the defendant in this respect.

The transaction out of which these pretended losses arose and in which they were incurred, according to the testimony of the defendant, was not only illegal and void, but criminal. The learned circuit judge gave to the jury a very long opinion concerning this transaction, and boldly, if not wisely, criticised the opinion of this court in Barnard v. Backhaus; but I do not understand him to have instructed the jury that there was not evidence establishing the illegality of this claim for losses as having been incurred by gambling transactions. The instruction appears to be that notwithstanding the original claim of $2,109.64 for these losses was void for that reason, yet, there having been differences concerning the same, it was compromised at a less sum, which became thereby a valid and lawful claim against the defendant. The learned judge says in his opinion to the jury: "As I understand the proofs, and I don't think there is any dispute on the subject, Everingham rendered his account to the defendant and the defendant objected to the validity of it, claiming they ought to bear the whole of these losses, and that they afterwards came to the conclusion that the question of the validity of the claim should be settled between them by a compromise, the plaintiff bearing a portion of the loss and the defendant the balance, about $1,000. Now that, I understand, the law makes a good compromise. It is the relinquishment of mutual claims—the one that the claim is valid, and the other that it is invalid—and their abandonment by the respective parties; and the settlement arrived at, I understand, constitutes a compromise. Compromises are fostered in the law." Certain parts of these sentences were excepted to by the defendant's counsel.

Is it quite correct to say that there was any difference between the parties as to the validity of this claim for losses? There was no evidence whatever that the validity of the claim was questioned or considered. It was a gambling claim, and both parties were presumed to know that it was invalid. The only evidence as to any difference between them as to this claim was that the defendant insisted the plaintiff ought to bear the whole, or, at least, part of these losses, because they were incurred by his fault, and the plaintiff agreed finally to bear a large part of them, viz., $1,261.44, and the defendant agreed to bear the balance, or $848.20. There was no question made of the real amount of the losses incurred, and no question as to their validity. It was a question who should bear them—this and nothing more. This matter is important as bearing upon the right to order a verdict in the case, and here may be found the reason why it was done; and also important because the learned counsel for the respondent makes the same point in his brief. Suppose A employs B to bet for him at faro, or any other game of chance, and B loses a large sum of money in the game, which he has paid, and demands payment of the losses of A, and there is difference of opinion between them as to the validity of the claim, and A finally agrees to pay one-half of it and B agrees to bear the other half of the loss himself, does this compromise make the claim legal? By all authorities and in common reason it does not, for both parties are equally guilty by entering into such a gaming contract, being presumed to know that the transaction is illegal, and neither can enforce the contract or the terms of any agreement or compromise arising therefrom. In such a case, if B had won at the game a large sum of money, most certainly A could not recover it by action, or any part of it, which might be the result of a compromise of a pretended difference between them as to the validity of such a claim. Where there is no difference between the parties as to the facts which make the claim valid or invalid, legal or illegal, then there can be no basis of compromise on the question of its validity, for both parties are presumed to know whether the claim in such a case is valid

or not. It follows that this part of the opinion of the learned judge as an instruction to the jury is erroneous, and the point in the brief of the learned counsel of the respondent in relation to the compromise of claims of questionable validity, and the authorities cited to sustain it, are inapplicable to this case, unless there was a reasonable question and uncertainty at the time as to the validity of the claim, which there were not and could not be.

It may be proper to say here, once for all, that we are satisfied as to the correctness of the decision in Barnard v. Backhaus, as applicable to the facts of that case, and do not believe that it requires any vindication, support or revision. Here the testimony of the defendant makes just such a case. The transaction, according to his testimony, was just as clearly gambling, by betting on the differences of market prices of grain at the chamber of commerce, between two fixed dates, as gambling by betting at faro, poker or other game of chance, or on a horse race, or an election, or any other uncertain and future event; and there can be no question of it in any intelligent mind, and quite likely there is not in the minds of those who operate in such "speculative deals," and the danger of such a flagrant example of gambling so destructive to the public morals, because practiced by persons of accepted high standing and influence, consists in its being obscured by appearances of respectability and of lawful contracts. It is the duty of the courts to apply the law against gambling in all cases impartially, irrespective of the specious and seductive forms of this vice and crime, or of the social standing of those who are guilty, whether they are high or low, rich or poor, or whatever their standing in society, church or State. It is apparent that this is precisely such a case as the learned counsel of the respondent concedes in his brief to be outside of the law making obligatory claims which result from a compromise of differences between the parties. He says, with his characteristic candor: "We do not claim that the compromise of an avowed and confessed illegal claim is sufficient consideration for a promise." This compromise is not different in any respect from a compromise of gain or losses of any other kind of gambling; and to hold it different, would necessitate also the holding that this transaction is not less or other than a gambling transaction. The authorities cited by the learned counsel of the respondent and his able and plausible argument on this question, are inapplicable to this case, and only apply to a case where the claim arose from a transaction or contract of a doubtful character, and which are not certainly illegal or invalid. I will not cite the numerous authorities which hold such dealing in options or betting on market differences are gambling transactions, for the question is at rest in this State by the decision in Barnard v. Backhaus, and I will not cite any of the numerous and uniform authorities which hold that a compromise of any pretended differences, in respect to clearly illegal contracts and transactions, can not purge them and produce a valid claim, for the case of Melchoir v. McCarty, 31 Wis. 252, sets that question also at rest; and it is expected that these decisions will be hereafter accepted as the law of this State, without cavil or criticism by inferior courts, and it is hoped that they will be so accepted by the bar. However, the brief of the learned counsel of the appellant, in which authorities on both questions are collated, is worthy of reference.

The testimony of the defendant tended to show that after the adjustment of July 1, 1878, it was agreed that wheat thereafter shipped by him should not be applied on the scalping account, but that the balance on that account should be paid only by gains or profits on future "speculative deals," so that he could draw fully on future shipments. To this effect he syas he construed the promise of the plaintiff: "I will help you all I can; I will make it back for you." This testimony would tend to show that the defendant never promised to pay, absolutely, any portion of the losses on former "scalping transactions." This question was also taken from the jury by ordering a verdict. Finally, it is sufficient to say that the circuit court erred by withdrawing the case from the jury, and by ordering a verdict.

The judgment is reversed, and the cause remanded for a new trial.

NEGLIGENCE — DANGEROUS PREMISES — VACANT PROPERTY.

GILLESPIE v. McGOWAN.

Supreme Court of Pennsylvania.

There is no obligation upon the owner of a vacant lot or unused brick yard to fence it, so far as his duty to passers-by is concerned. So, where a boy eight years of age was drowned in a well dug in an open field, over one hundred feet from the highway, the owners thereof can not be held negligent in permitting the well to remain without a guard.

PAXSON, J., delivered the opinion of the court:

The defendants below were the owners of a field near Long Lane, in the southern part of the city of Philadelphia. This field had formerly been used as a brick yard, but the brick clay having been exhausted, it had long since ceased to be used for such purpose, and was lying out in commons. The surface, as is usual in abandoned brick yards, was uneven, and in one portion of it there was a well of water about six feet in diameter and twelve feet deep. This well was constructed originally for purposes of drainage as well as to supply water for brick making. The field was not enclosed, nor was there any guard around the well. The sides of the latter were sloping at the top. There were no bushes about it to conceal it from the eye, and its situation was

such that no one would be likely to walk into it, unless in the darkness of the night. It was over one hundred feet from the public highway, and about three hundred yards from the nearest house. There was evidence of a path or paths across the field, but not directly to the well, and that it was used to some extent as a place of resort by children and adults. About four o'clock on the afternoon of Friday, July 9, 1880, the plaintiff's son, a boy of seven years and ten months of age, was found drowned in this well. According to the testimony, his death must have occurred between one and four o'clock P. M. There was nothing to throw any light upon the circumstances connected with this sad fate beyond what I have thus briefly stated.

The father of the boy brought this action in the court below to recover damages or compensation for his death; the ground of the action being that the owners of the field were guilty of negligence in permitting the well to remain without a fence or guard of some kind to protect it. The jury rendered a verdict in favor of the plaintiff, upon which the court below entered a judgment against the defendants, who have brought the record into this court by writ of error for review.

Upon the trial in the court below the learned judge instructed the jury as follows (see first the second assignments): "I say to you that a child can not be treated as a trespesser or wrong-doer, and even trespassers may have rights when injuries are negligently inflicted upon them. The true principle which must be applied to a case of this kind is this, the owner of premises in the neighborhood of a populous city, and opening on a public highway, must so use them as to protect those who stray upon them and are accidentally injured:"

This ruling was based upon Hydraulic Works Co. v. Orr, 2 Norris, 332. The language used was not that of this court, yet it is only fair to the learned and able president of the court below to say that is substantially the ruling of the learned judge who tried the case in 2 Norris, and which was affirmed here. That case, however, was decided upon its own peculiar circumstances. The Hydraulic Works Company maintained upon its premises what this court designated as a dangerous and deadly trap, weighing over eight hundred pounds and liable to fall at any moment and "crush children beneath it like mice in a dead fall." It was in the heart of the city close to a public highway, and the access to it frequently left open; and it was, moreover, so constructed as not to give any indication of its danger. It was to such a structure, so situated, that the learned judge who tried that cause below applied the language referred to.

It is also to be noticed that the opinion in Hydraulic Works Co. v. Orr makes no reference to the assignments of error, and contains no authorities in support of it. What this court meant to decide in that case was, that a person who maintains such a dangerous trap, close to a public highway, in the heart of a large city, might be liable to a person injured thereby, although such person were a child of six years of age, trespassing upon the premises, and the familiar principle was invoked that "one may not justifiably, or even excusably, place a dangerous pitfall, a wolf trap or a spring gun, purposely to catch even wilful trespassers poaching upon his grounds." Hydraulic Works Co. v. Orr is authority only for its own facts. It was not intended to assert the doctrine that "a child can not be treated as a trespasser or wrong-doer;" and so far as it appears to sanction such principle, it must be considered as overruled. To apply such a doctrine to a boy lacking but two months of eight years of age, would overturn the law as it has existed in England and in this country for two hundred years. It needs but to turn to as familiar an authority as Blackstone to see that a child of this age is liable for his torts, and may be punished for his crimes. It is true, the law properly holds that a child of tender years shall not be charged with contributory negligence. But this principle can not be applied as a rule of law in all cases to children nearly eight years of age. Much may depend upon the character of the injury, the circumstances under which occurred, and the size, intelligence and maturity of the child. In such cases a jury must be allowed to pass upon the question of contributory negligence; it is error to rule it as a question of law.

Nor do we assent to the broad proposition that "the owner of premises in the neighborhood of a populous city, and opening on a public highway, must so use them to protect those who stray upon them and are accidentally injured." This doctrine rests chiefly upon the case above referred to, which was not intended to decide any such principle, and is in direct conflict with the recent well considered case of Gramlich v. Wurst, 5 Norris, 74, in which it was held that "where the owner of land, in the exercise of lawful dominion over it, makes an excavation thereon, which is such a distance from the public highway that the person falling into it would be a trespasser upon the land before reaching it, the owner is not liable for an injury thus sustained."

In that case the deceased, during a dark night, fell into an excavation made for the construction of a vault, upon a lot fronting on one of the public streets of the City of Philadelphia. The excavation was within eighty feet of this street and was unguarded; but the court held the owner was not liable.

The well established principle in such cases is that "where an excavation is made adjoining a public way, so that a person walking on it might, by making a false step or being affected with sudden giddiness fall into it, it is reasonable that the person making such excavation should be liable for the consequences. But when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case

seems to be different." Hardcastle v. South Yorkshire R. Co., 4 Hurl. & N. 67; Hunsell v. Smith, 7 C. B. (N. S.) 731.

The same doctrine was asserted with much force by Chief Justice Gibson, in Knight v. Aber, 6 Barr, 472, where he said: "A man must use his property so as not to incommode his neighbor; but the maxim extends only to neighbors who do not interfere with or enter upon it. He who suffers his cattle to go at large takes upon himself the risks incident to it. If it were not so, a proprietor could not sink a well or a saw pit, dig a ditch or mill race, or open a stone quarry or mine coal on his own land, except at the risk of being made liable for consequential damages from it, which would be a most reasonable restriction of his enjoyment." This principle is further sustained by Philadelphia, etc. R. Co. v. Hummell, 8 Wright, 378; Gillis v. Pennsylvania R. Co., 9 P. F. S. 129; Cauley v. R. Co., 37 Legal Int. 513; [S. C., 13 Cent. L. J. 281] Duff v. Alleghany Valley R. Co., 10 N. 458.

It is settled by abundant authority that to enable a trespasser to recover for an injury he must do more than show negligence. It must appear that there was a wanton or intentional injury inflicted on him by the owner. It is sufficient to refer to Gillis v. Railroad Co., *supra*, where the subject is discussed by the present Chief Justice, and many of the authorities referred to. In Hydraulic Works v. Orr, there was a recklessness that may be said to partake of the nature of wantonness, and it is only upon this principle that judgment can be logically sustained.

We are unable to see anything in this case to charge the defendants with negligence in not enclosing their lot or guarding the well. There was no concealed trap or dead fall as in Hydraulic Co. v. Orr. The well was open and visible to the eye. No one was likely to walk into it by day, and this accident did not occur at night. A boy playing upon its edge might fall in, just as he might in any pond or stream of water. In this respect the well was no more dangerous than the river front on both sides of the city, where boys of all ages congregate in large numbers for fishing and other amusements. Vacant brick yards exist on all sides of the city. There are streams and pools of water where children may be drowned; there are inequalities of surface where they may be injured. To compel the owners of such property either to enclose it or fill up their ponds and leave the surface so that trespassers may not be injured, would be an oppressive rule. The law does not require us to enforce any such principle, even where the trespassers are children. We all know that boys of eight years of age indulge in athletic sports. They fish, shoot, swim, and climb trees. All of these amusements are attended with danger, and accidents frequently occur. It is part of a boy's nature to trespass, especially where there is tempting fruit; yet I never heard that it was the duty of the owner of a fruit tree to cut it down because a boy trespasser may possibly fall from its branches. Yet the principle contended for by the plaintiff would bring us to this absurdity if carried to its logical conclusion. Moreover, it would charge the duty of the protection of the children upon every member of the community except their parents.

Judgment reversed.

WEEKLY DIGEST OF RECENT CASES.

1. Attorney and Client—Admission to the Bar Obtained by Fraud.

The order of this court admitting the defendant to practice is in the nature of a judgment that he possessed the requisite qualifications when the order was made and entered. It follows that the judgment, while it continues in force, is an adjudication determinative of the fact that defendant was of "good moral character" when he was admitted by this court, and an attack upon his previous character can not be made the basis of an order for his "removal." Nevertheless this court will be justified, of its own motion, in setting aside the order admitting the defendant to practice, should it appear that the order was obtained by means of fraudulent artifices of concealment. *In re Lowenthal*, S. C. Cal., September 15, 1882, 10 Pac. C. L. J., 114.

2. Attorney and Client—Suspension—District Attorney.

In the year 1874, respondent, as District Attorney of Lassen County, drew up an indictment against one Harris, which was returned to the county court by the grand jury, indorsed "a true bill." In 1881, Harris appeared in the Superior Court, and respondent as his counsel, moved to set aside the indictment. The motion was granted. In preparing for and making the motion—which was based upon the omission of certain forms—respondent was not assisted by information received by him in his capacity of district attorney; and when the motion was made, he had no unusual knowledge of the statutory provision which made his act a misdemeanor. *Held*, independent of the statute, there can be no doubt that the conduct of respondent was reprehensible. By appearing both for plaintiff and defendant in the same action, he was guilty of "a violation of his duty as an attorney," for which it is the duty of this court to remove or suspend him. Neither his ignorance of the laws, nor the crudity of his notions of professional ethics, can excuse an offense against professional propriety by one whose duty it is to assist in the administration of justice. The degree of turpitude involved in the breach of his duty by an attorney, however, must appear in the

circumstances of each case. The punishment which should follow an inadvertent or ignorant departure from professional propriety—no seriously evil consequences having resulted—should be less severe than where the offense is a deliberate or corrupt violation of official oath. *People v. Spencer*, S. C. Cal., September 21, 1882, 10 Pac. C. L. J., 127.

3. CONSTITUTIONAL LAW—SAN FRANCISCO LAUNDRY ORDINANCE—PROHIBITION OF OCCUPATION.
An ordinance of the city of San Francisco regulated by a system of licenses the business of laundries within specified limits under penalties for misdemeanor. *Held*, that the ordinance was void; that where licenses are merely a means of prohibiting any of the vocations of life (not injurious to public morals, health, etc.), they can not be upheld. *In re Quong Woo*, U. S. C. C., D. Cal., July, 1882, 14 Rep., 417.

4. CORPORATIONS — STOCKHOLDER'S LIABILITY — REDUCTION OF CAPITAL STOCK.
The holders of unpaid (or partially paid) stock of a corporation, being liable to the creditors of the corporation to the extent of their unpaid stock, are not relieved of liability by the action of the stockholders in reducing the capital stock of the corporation, cancelling outstanding certificates of stock, and issuing full paid certificates for the amount of the reduced capital. They continue to be liable as before to those who were creditors at the time the capital stock was reduced. *In re State Ins. Co.*, U. S. C. C., N. D. Ill., June, 1882, 14 Rep., 420.

5. CRIMINAL LAW—MURDER — UNSKILFUL TREATMENT OF DECEASED.
Unskilful treatment of the deceased is not a ground for acquittal of the accused in a case of murder. *State v. Barnes*, S. C. La., March, 1882; 14 Rep., 433.

6. DIVORCE—ALIMONY—QUANTUM.
Where the wife brings no means to the marriage, and derives none by inheritance afterward, and whatever property there is was accumulated through the efforts of the husband, it is not proper, on granting the wife a divorce, to give to her part of the husband's real estate in fee. The alimony in such case should not exceed one-half of the husband's income. *Wilson v. Wilson*, S. C Ill., March, 1882; 14 Rep. 431.

7. EJECTMENT—PROPERTY IN POSSESSION OF THE UNITED STATES.
The remedy of a person claiming real property in the possession of the United States is by action of ejectment against the Federal officer in possession of the property, and the fact that the defendant is in possession as such officer is no defense to the action. *King v. La Grange*, S. C. Cal., Aug., 1882; 14 Rep., 428.

8. ESTOPPEL—CLAIM IN ACTION.
Where one party to a contract claims that it has been rescinded and judgment against the other party upon the *quantum meruit*, he is estopped, in a later litigation with the same party, from claiming the right to carry out the contract; and the record in the former action is admissible to establish the estoppel. *Martin v. Boyce*, S. C. Mich., Oct. 4, 1882: 13 N. W. Rep., 886.

9. EVIDENCE—COMPETENCY—DEATH OF PARTY.
The deposition of an interested witness taken in a proceeding when both parties thereto are alive is admissible after the death of one of them, in another proceeding touching the same subject matter between the survivor and the representative of the deceased party. If, however, the deposition be insufficient to prove the fact for which it is offered, the judgment will not be reversed, although there may have been error in rejecting it on the ground of competency. *Galbraith v. Zimmerman*, S. C. Pa., May 1, 1882; 13 Pittsb. L. J. 83.

10. EVIDENCE—IMPEACHING WITNESS.
A witness in a criminal case can not be impeached by showing that out of court he had expressed suspicions as to the respondent which on cross-examination he says he does not remember expressing. *People v. Stackhouse*, S. C. Mich., 4, 1882; 13 N. W. Rep., 364.

11. INSURANCE — DEFAULT IN PAYMENT OF PREMIUM.
Upon a policy of insurance in which one of the conditions was that in case of default of payment of any note given for premiums the company should not be liable for any loss happening during the continuance of such default, *held*, there being a breach of such condition, the company may waive the forfeiture, either by express language, or by acts from which an intention to waive may be inferred. If, in any negotiations or transactions based upon the policy, and relating thereto, after forfeiture under circumstances indicating to the company or its authorized agent that the insured makes a claim under the policy notwithstanding such default, and no reply is made to such claim indicating the intention of the company to take advantage of the forfeiture, and the insured afterwards incurs the trouble and expense of making proofs of loss, *held*, that the forfeiture is thereby waived. *Held, further*, that the acceptance of the cash premium by the general agent of an insurance company after default and notice of the loss operates as a waiver of the forfeiture, and renders the company continuously liable on the policy, as though the note given for cash premiums has been paid at maturity. *Smith v. St. Paul Fire & Marine Ins. Co.*, S. C. Dak., July 20, 1882; 13 N. W. Rep., 355.

12. INSUARANCE—HAZARDOUS ARTICLES — SPECIAL PERMIT.
A policy of insurance containing a clause prohibiting the keeping of gunpowder, saltpeter and other hazardous articles, but also giving consent to keep articles usual in the trade of a wholesale grocer, and special permit to keep gunpowder, is not avoided by keeping saltpeter in such quantity as was usual in the business of wholesale grocer. The special permit to keep gunpowder did not by implication exclude all other hazardous articles. *Stout v. Commercial Union Ins. Co.*, U. S. C. C., D. Ind., 15 Chi. Leg. N., 39.

13. JURY TRIAL—COMPETENCY OF JUROR IN CRIMINAL CASE—VOIR DIRE.
The judge is not absolutely bound by the answer of a juror on his *voir dire* that he has or has not formed an opinion, when the answer is contradicted by the facts or circumstances of the case. *State v. Barnes*, S. C. La., March, 1882, 14 Rep., 33.

14. LANDLORD AND TENANT—EVICTION.
When a landlord enters wrongfully upon the demised premises and does such acts as make the occupancy of the building unsafe, it is an eviction. The intention with which the acts were done is not a question for the jury. *Skalley v. Shute*, S. Jud. Ct. Mass., 14 Lanc. Bar, 75.

15. MUNICIPAL CORPORATION — MAINTAINING A WHARF.

A city has a right to build a wharf for public purposes where any street, which has been duly dedicated to the public, abuts upon a navigable stream. *Backus v. Detroit*, S. C. Mich., Oct. 4, 1882; 13 N. W. R., 380.

16. NEGLIGENCE—IMPUTED NEGLIGENCE.

The rule which makes a traveler on a public highway guilty of contributory negligence if he does not exercise a certain degree of care, caution and judgment before crossing a railway track, was *held* inapplicable in a case where a woman who had just been landed from a steamboat upon a long pier on which there were about 200 persons, was run over by a train of freight cars, loaded with iron and running down a heavy grade upon the wharf, without any locomotive. *Held, moreover*, that the facts were sufficient to show gross negligence in the railway company, and that the negligence of the steamboat company, if any, did not relieve it from responsibility. A passenger who has just landed from a steamboat is not so identified with the steamboat company as to make the company solely liable for an injury suffered by the passenger from another quarter immediately afterwards. *Malmsten v. M——, etc. R. Co.*, S. C. Mich., October 4, 1882, 13 N. W. Rep., 373.

17. PARTNERSHIP—MONEY BORROWED ON INDIVIDUAL CREDIT—PARTNERSHIP REAL ESTATE.

1. Money borrowed by one partner, on his individual credit, will not become a debt of the firm by being used in its business; and the rule is not different where the money was loaned for the purpose of enabling such partner to pay to the firm his portion of a specified sum which each partner had agreed to contribute in order to increase the firm's capital. 2. Land purchased with partnership funds and occupied and used by the firm in conducting its business, is partnership property, although the conveyance is made to the individual members of the firm; and a third person having knowledge of such facts, who takes from one of the partners a mortgage on his individual interest in such land to secure the individual debt of such partner, will be postponed to to the lien of a firm creditor whose debt accrued subsequently to the execution of such mortgage. *Norwark National Bank v. Sawyer*, S. C. Ohio, Oct. 3, 1882; 3 Ohio L. J., 133.

18. SPECIFIC PERFORMANCE—DAMAGES IN LIEU.

In an action to recover compensation in lieu of the specific performance of an agreement for the conveyance of land, on the ground that specific performance has become impracticable, the real representatives of the deceased selling party are necessary parties; and if they have disabled themselves from performing the agreement, they are the parties chargeable with making compensation. *Crabill v. Marsh*, S. C. Ohio, October 3, 1882; 3 Ohio L. J., 135.

19. STATUTE OF FRAUDS—VERBAL AGREEMENT FOR THE SALE OF LANDS.

On a verbal agreement for the conveyance of land, the payment of the purchase money, whether made in money or services, will not take the agreement out of the operation of the Statute of Frauds. *Crabill v. Marsh*, S. C. Ohio, October 3, 1882; 3 Ohio L. J., 135.

20. WILL—DEVISE OF CONTINGENT INTEREST IN PERSONALTY—ASSIGNABILITY.

Where personal estate is devised to a person in being, his right to depend upon his surviving another, his interest is something more than a mere naked possibility, and may be transferred or assigned in equity. *Grayson v. Tyler*, Ky. Ct. App., Sept. 14, 1882; 2 Ky. L. J., 163.

QUERIES AND ANSWERS.

*[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

40. For the purpose of forestalling competition a railroad company acquires, by private contract from A, "the exclusive right of way" through his tract of land, two miles square. A subsequently grants to a second railroad company a right of way over the same territory. The second company had full knowledge of the claim of the first, and now begins to lay its track upon portions of the land neither occupied by nor necessary to be used by the first. Has the first company any remedy? Can its rival be enjoined? A.

Parkersburg, W. Va.

41. A married woman obtains a divorce from her husband, and the custody of her child, a little girl three years old, is awarded her. Afterwards a petition is filed in the county court in the State of Illinois, where the mother resides, by A and B, his wife, for the adoption of the child. She filed her consent for the adoption by A and B. A decree is rendered in accordance with the petition. There is no provision in the statute for a re-adoption. A and B afterwards desire to surrender the child and the mother desires to reclaim it. Query: What legal steps, if any, can be taken to legally restore the parties to their original positions? E. H. A.

RECENT LEGAL LITERATURE.

ROBINSON'S ELEMENTARY LAW. Elementary Law. By William C. Robinson, LL.D. Boston, 1882: Little, Brown & Co.

This volume, which is intended for the student, will be found to be of real and practical value as an introduction to his severer studies. Being intended to give him a comprehensive view of the whole field of jurisprudence as a preparation to more elaborate examination of details, the method of stating details is very properly brief and didactic, discussing no mooted questions and advancing no opinions or theories. Instead of citing authorities for the statements contained in each paragraph, the author has adopted, what seems to us, to be the very practical and useful plan of directing the student, at the

close of each paragraph, to a sort of parallel reading, on the subject treated, in some standard text-book or leading case. The benefit of such parallel readings, if faithfully pursued, can hardly be over estimated. The effect would be to familiarize the reader with the most practical means of discovering the law in its original sources. Another commendable feature of the book is that the author has thoughtfully prefixed a table of references indicating the meaning of the abbreviations used, which, to the callow student, are so frequently mere snares and stumbling blocks, making every reference a sort of Chinese puzzle, the solution of which requires the expenditure of much time and patience, and in not a few cases, forms an insuperable barrier to the more verdant investigator.

Altogether the work is valuable, more especially as it does not seek to supplant any standard treatise, but forms a much needed introduction to more advanced works.

NEW JERSEY EQUITY REPORTS. Reports of Cases decided in the Court of Chancery, the Prerogative Court and, on appeal, in the Court of Errors and Appeals, of State of New Jersey. John H. Stewart, Reporter. Vol. 8. Trenton, 1882: W. S. Sharp Printing Co.

There are few States blessed with such a reporter as Mr. Stewart. We have recently given our readers a "touch of his quality" in the very elaborate notes to the cases of Cornell v. Andrews, 15 Cent. L. J. 8, and Cutter v. Kline, 15 Cent. L. J. 289. Such notes as these scattered through his volumes, are no inconsiderable addition to their practical value. As precedents increase in multitude, so grows the demand for increased facilities for searching them out and arranging them.

POLLOCK'S JURISPRUDENCE AND ETHICS. Essays in Jurisprudence and Ethics. By Frederick Pollock, M. A., LL.D. London, 1882: Macmillan & Co.

This volume is a bundle of republished essays, upon legal and ethical subjects, which have from time to time within the last seven years appeared in various journals and reviews. Only a portion of them are of professional interest to our readers; and, as to that portion, the interest is rather speculative than practical. We do not desire to underestimate or belittle the value of speculative learning and investigation in the field of jurisprudence, and our partiality to the utilitarian and practical is due rather to an appreciation of the wants of our readers than to a depreciation of the scientific value of investigations into the abstract principles of the law. There may have been a time in the history of the English law, when the practitioner found it practical and desirable to trace the roots of the principles which were applied in court, to the foundations of society, and to master the learning of cognate principles of ethics; though the statement of the proposition suggests a doubt. If so, that time has long since passed, it may be safely said, never to return. Such investigations must now be left to professed *doctrinaires* and some text writers of the more laborious and ambitious type. The modern lawyer is a busy man of affairs, whose days hardly suffice for the multitude of intricate and diverse matters which are presented for his consideration. And the ends to which his efforts are directed, and the solutions which he must reach, are, after all, practical ones. We do not say that it is best that this should be so, but merely that it is so. Such of our readers, however, as are interested in the speculative view of legal doctrines, will find these essays pleasant and suggestive reading. Mr. Pollock's style is clear and pointed, and his choice of topics usually very happy. The paper upon Partnership will, we fancy, be found particularly interesting.

NOTES.

——Some years ago a distinguished member of the New York bar was retained on one occasion by a friend, also a New Yorker, to attend to a complaint made against him before a New Jersey justice for an alleged assault and battery upon one of the residents of the "old Jersey State." "I appear for the prisoner," said the counselor to the modern Dogberry "You abbears for de bris'ner, do you? —and who den be you?" interrupted the justice, eyeing him from head to foot with marked curiosity. "I don't know you. Vair be's you come from and vot's yer name?" The counselor modestly gave his name, and said: "I am a member of the New York bar." "Vell, den," replied the justice, "you gan't bractis in dis here gort." "I am a counselor of the Supreme Court of the State of New York," reiterated the attorney. "Dat makes not'ing tifferent," said the inveterate justice. "Well, then," said the baffled lawyer, "suppose I show to your Honor that I am a counselor of the Supreme Court of the United States?" "It ton't make it a bit petter," replied he of the ermine, "you ain't a gounselor von de State of New Jarsey, and you gan't bractis in dish gort." On another occasion the same dignitary said to a jury, who had been listening to a "trial" before him of an unfortunate fellow for some offense against the State. "Shentlemens of der shoory, shtand up; dis here vellow, der bris'ner at de par, says he ish von New York. Now, I dinks he pes a putcher-poy, und if he ish a putcher-poy he trives der pigs troo de shreet, und ven he trives der pigs, he kits oder peebles pigs mit dem vot he haf before. Dat's wot I call vig shtealin'. Now

shentlemans, if de vellow shteals pigs in New York, I t'ink he vill shteals a gow in Jarsey, and derefore, I t'ink he be a cow t'ief, und your judgment s'all be kilty. Vot you shall say, shentlemans of de shoory?—ish he kilty or not kilty? If you says he ish kilty, I sends him to Shtate brison, mit two years." And he did send him.

——Ex-Judge Dennison, formerly Chief Justice of Washington Territory, was arguing a motion in the district court before his honor, Charles Greene, who is credited with being a very scholarly man. Judge Dennison is a lawyer of the old school—tall, clean shaven, with deep-toned voice and stately manner. Having occasion to refer to "Browne on Medical Jurisprudence," Dennison pronounced it as if in two syllables, Brow-ne. Judge G. interrupted him with the remark: "I presume you mean *Brown*, do you not?" "Your honor," replied D., "this author's name is spelled B-r-o-w-n-e, and if that does n't spell Brow-ne I don't know what does." "But," said the judge, "my name is spelled G-r-e-e-n-e, and you would 't call it 'Greeney,' would you?" Without a smile on his sphinx-like face, and in his most sepulchral tone, came the answer, which convulsed the court: "Your honor, that will depend on how you decide this motion."

The *Cornhill Magazine* presents the following nice points of "French Justice:"

——A man wishing to steal fowls, clambers over a garden wall at night, and breaks into a fowl-house. He has a bludgeon or crowbar in his hands, but makes no use of either to inflict bodily hurt on those who capture him. Nevertheless, this man is a felon who has committed a burglary which the quarter circumstances aggravate, that is, in the night with escalade (climbing over walls), with efraction (breaking open a door), and a main armee (with a weapon in his hand). He can only be tried at the assizes, and, if convicted on the four counts, must get eight years' seclusion, or twenty years' transportation. On the other hand, take a man who, by false pretenses, obtains admission to a house or shop, intending to commit a robbery there. He lays hands on some valuables, and being surprized in the act, catches up a poker and knocks his detector down, inflicting a serious wound. This man's crime is evidently worse than that of the other who went after the fowls—his is only a misdemeanor, however, for he gained admittance to the house without violence, and was unarmed; his catching up the poker, although it may have been a premeditated act, inasmuch as he intended from the first to defend himself somehow if caught, was equally speaking, only an act of impulse committed on the spur of the moment and without malice prepense. Therefore, this man can only be tried by a correctional court, and can not get more than five years' imprisonment. Again, if a man wishing to inflict on an enemey some grievous bodily harm, walks into a cafe, says a few angry words to him, and disfigures him by smashing a decanter upon his face, it is a misdemeanor, extenuated by the apparent absence of premeditation. The man walked into the cafe unarmed, and in the heat of quarrel picked up the first weapon that came to his hand. It might fairly be alleged that the man knew that he should find a decanter in the cafe, and that his quarrel was purposely entered into, but the law will not take account of this. If, on the contrary, the man entered his enemy's house with a loaded stick in his hand, and assaulted his enemy with that stick, he would be a felon who must go to the assizes on a charge of attempted murder. If might be that the man had taken the stick without reflecting that it had a leaden knob, but the onus of proving that his intentions were not murderous, and that in fact when he entered the room he did not even propose to commit a common assault, would rest upon himself. A jury would probably judge his case according to his antecedents, and if it were shown that his past life was not blameless, he might fail to get extenuating circumstances, and might receive twenty years' transportation.

——A humorous correspondent writes as follows: I have read occasionally in your columns strictures on the ease and frequency with which divorces are granted. To remedy this evil—as far as law can remedy an evil—I suggest the following: Sec. 1. Exclusive jurisdiction in matters of divorce and alimony is vested in the criminal courts. Sec. 2. That any husband and wife who shall fail or refuse to cohabit as such for the space of ——, shall be deemed guilty of a felony and punished by, etc., etc. Sec. 3. That either party may plead by way of justification any cause that he or she may have for a divorce. Sec. 4. If the jury return a verdict of guilty as to one of the defendants, and sustains the plea of justification as to the other, the court, in addition to the usual sentence, shall render a decree for a divorce *a vinculo*. Sec. 5. If the jury return a verdict of guilty as to both defendants, or sustain a plea of justification as to both, then the sentence of the court shall be that the defendants be imprisoned together in the jail for a term of ——, unless they sooner become reconciled, and agree to cohabit, when they may be discharged. Sec. 6. A second or third offense might be made a felony without benefit of clergy. Sec. 7. The warrant of arrest, in addition to the usual command, should order the sheriff to take possession of the property of the defendants, and hold the same subject to the order of the court, to pay expenses, alimony, etc. Sec. 9. And other provision may be made when the defendants, or either of them, have absconded. Also, for the custody of the children during imprisonment. They might be allowed to visit their parents in confinement, and I think this would remedy the evil of collusive divorces. Their confinement together, without other company, for a few months, would often bring about a reconciliation.